IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 52 OF 1987

Balu Natha Repe
R/o. Valivade, Taluka: Karvir,
Dist. Kolhapur. ... Appellant.

Versus.

Smt.Kamalaben Natha Repe
(deceased by her heirs)
1. Smt.Yesabai w/o.Ramchandra Nethe
(since deceased by LRs.)

A) Ramchandra Nana Methe,
Age: 76, Occ.: Agriculturist,
R/o. At Post Vashi, taluka Walwa,
Dist.Sangli.
B) Shankar Ramchandra Methe,
Age: 33, Occ.:Agriculturist,
R/o.At Post Vashi, Kedegaon,
Tal: Walwa, Dist.Sangli.
C) Kamal Babab Khot,
Age: 35, Occ.:Housewife,
R/o.At Post Rethredharang,
Tal.:Walwa, Dist.Sangli
(Appeal against 1-B & 1-C stands
dismissed for want of prosecution
vide Court's order dt.9.7.2004)

2. Smt.Savubai w/o.Dattui Methe,
R/o. Vashi, Taluka: Walve,
Dist: Sangli.

3. Smt.Bayakkabai w/o.Baburao Redekar,
(Since deceased through LRs.)
A. Smt.Housabai Bapu Chavan,
Adult, R/o. at & Post: Valivade,
Tal: Karvir, Dist. Kolhapur.

4. Jalandar Dattu Methe, Adult.

5. Babasaheb Ramchandra Methe, Adult,
both Agriculturists, residing at
Walivade, Tal: Karvir, Dist.Kolhapur. ...Respondents

Shri P.R.Patil for the Appellant.

Shri S.S.Pandit for the Respondents Nos.2 to 5.

CORAM : ABHAY S.OKA, J.

DATED : 27th January, 2005.

ORAL JUDGMENT.

1. The Appellant is the original Defendant and the Respondents are the legal representatives of the original Plaintiff. The relationship between the parties is not disputed. The Defendant/Appellant is the son of the eldest daughter of the Plaintiff. It is the case of the Defendant that the Plaintiff and her husband adopted the Defendant by deed of adoption dated 2nd March 1967 which is duly registered under the Indian Registration Act, 1908. The case of the Plaintiff is that the alleged adoption of the Defendant is illegal and is not binding on her. Her case is that the Defendant took undue advantage of her old age and got entered his name in the Revenue record in respect of the suit land and he has been cultivating the suit land forcibly. Therefore, the Plaintiff filed suit for possession.

2. The suit was resisted by the Defendant by relying upon the deed of adoption. He contended that by the deed of adoption, the suit land was given to him as full owner and accordingly his name was entered in the record of rights. A contention has been raised that by deed of

adoption the Plaintiff and her husband had relinquished their right in respect of the suit land.

3. The learned trial Judge held that the Plaintiff was exclusive owner of the property. The learned trial Judge however held that the adoption of the Defendant was legal and valid. The learned trial Judge held that there was no relinquishment effected by the Plaintiff and her husband by deed of adoption and therefore, the decree for possession was passed in favour of the Plaintiff. An appeal was preferred by the Defendant to the District Court. During the pendency of the Appeal on 3rd January 1982, the Plaintiff expired. It appears that there was a dispute as regards her heirship. Therefore, an order was passed by the Appellate Court directing the trial Court to hold an enquiry under the provisions of Rule 5 of Order XXII of the Code of Civil Procedure, 1908. The parties placed reliance on the two different Wills of the deceased Plaintiff. The learned trial Judge on enquiry held that both the Wills were not genuine. By the impugned Judgment and Decree, the appeal preferred by the Defendant has been dismissed.

4. The learned Counsel appearing for the Appellant-Defendant submitted that in view of the clear recitals in the deed of adoption dated 2nd March 1967 the deceased Plaintiff relinquished her right, title and interest in the suit property in favour of the

Defendant. He submitted that the adoption is held to be legal by the trial Court and the said finding is not challenged by the original Plaintiff. He submitted that the trial Court has framed a specific issue on relinquishment. He submitted that the Appellate Court has however failed to frame point for determination on the basis of the said contention of the Defendant as regards relinquishment. He, therefore, submitted that as the Appellate Court has not framed points for determination as required by Order LXI Rule 31 of the Code of Civil Procedure, 1908, the Appeal is required to be remanded to the District Court. He relied upon the Judgment of the Apex Court reported in (1990) 1 S.C.C. page 1 (Dinaji & others v/s. Daddi & others) and submitted that the deed of adoption records an agreement to the contrary within the meaning of section 13 of the Hindu Adoption and Maintenance Act 1956 (hereinafter referred to as "the said Act of 1956").

5. The learned Counsel for the Respondents has supported the impugned Judgment and Decree.

6. By way of reply the learned Counsel appearing for the Appellant submitted that the Appellant is not liable to pay mesne profits from the date on which the original Plaintiff expired as in his capacity as one of the legal representative of the deceased Plaintiff his possession cannot be said to be unlawful.

7. I have considered the rival submissions. The Second Appeal was admitted on 2nd February 1987 by passing the following order:

> "Heard. The apeal involves subsantial question of law regarding succession. Hence admitted."

The learned Counsel for the Appellant stated that the submissions which he was making were covered by the substantial question of law which is already framed. Though the said statement is not correct, I have considered the submissions made by the learned Counsel appearing for the Appellant. It is to be noted here that in paragraph 18 of the Judgment of the Appellate Court a finding has been recorded that the said property was not given in possession of the Defendant either by the Plaintiff or her husband by relinquishing their rights. It is true that the point for determination is not specifically framed by the Appellate Court on the relinguishment. However, the discussion in paragraph 18 of the Judgment shows that the Appellate Court has dealt with the contention based on relinquishment. It is also to be seen here that in paragraph 6 of the Judgment the Appellate Court has recorded the submissions made by the learned Advocate appearing for the Appellant. It appears that the only submission made before the Appellate Court was on the basis of the will which was

propounded by the Appellant. From the paragraph 6 it appears that no specific submission was made on the issue of relinquishment. Nevertheless I have considered the merit of the submission made by the learned Counsel appearing for the Appellant.

8. He has placed reliance on the recitals in the deed of adoption. It is to be noted here that there is no specific reference to the suit land in the said document. Reliance is placed on one sentence in the said deed of adoption the English translation of which is as under:

> "From today you have become owner of our moveable and immoveable property."

However, the said recital has to be read in the context of the recital which immediately preceds the same. It is recited that the Plaintiff and her husband had given all the rights to the Defendant which their natural son would have possessed. It in that context that the recital which is relied upon by the learned Advocate for the Appellant has been incorporated. There is nothing in the deed of adoption which reflects intention of the Plaintiff to relinquish her right, title and interest in the suit land during her lifetime in favour of the Defendant. Reliance was also placed on the Application made by the Plaintiff and her husband dated 5th December

1967 (Exh.66) to the Revenue authorities. In the said application reference is made to the deed of adoption and it is stated that as the Plaintiff and her husband were not in position to manage the property due to old age, the name of the adopted son should be incorporated. Even if both the documents i.e. the deed of adoption and the said application are read together the intention of the Plaintiff to relinquish her right title and interest in the property in favour of the Defendant is not at all reflected. Therefore, the learned trial Judge has recorded a finding while answering issue No.3 that there is no relinquishment.

9. In the decision of the Apex Court in the case of Dinaji & others (supra) relied upon by the learned Counsel for the Appellant, the Apex Court was dealing with the case where there was a recital in the deed of adoption that the adoptive mother will have no right to alienate any part of her property after the execution of deed of adoption. The Apex Court has referred to section 13 and held that it was open for the parties by an agreement to limit the operation of proviso (c) to section 12 of the said Act of 1956. The Apex Court noted that the document has not been registered as required by section 17(1)(b) of the Indian Registration Act 1908. In my view the ratio of the said Judgment of the Apex Court will have no application to the facts of the present case. If on plain reading of the deed of

adoption there is no relinquishment and the only intention which is reflected from the deed of adoption is the intention to confer on the Defendant all rights of a natural son, no fault can be found with the finding of the Appellate Court that the Defendant was not put in possession on the basis of relinquishment of right title and interest of the Plaintiff and/or her husband. It is true that point for determination has not been framed by the Appellate Court. However, failure to frame point for determination is not fatal so long as there is no failure of justice. In the present case from the discussion which is made earlier, it is apparent that there cannot be any failure of justice.

10. In this view of the matter, there is no merit in the Second Appeal and the same is dismissed with no order as to costs.

Judge.